SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 670

ADDISON MILLER, A. T. MILLER, AND GEORGE FALTICO, PARTNERS, DOING BUSINESS AS ADDISON MILLER COMPANY, ADDISON MILLER, INC., GREAT NORTHERN ICING COMPANY, AND ADDISON MILLER, INC. (ILLINOIS),

vs. *Petitioners,*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, rendered on November 9, 1943, has not been officially reported, but it appears at 12 Law Week, 2284 Sec. 2 (No. 19).

II.

Jurisdiction.

1. The petition for writ of certiorari is applied for under Judicial Code, Section 240 as amended February 13,

1925, C. 229, Sec. 1, 43 Stats. 938, January 31, 1928, C. 14, Sec. 1, 45 Stats. 54, and June 7, 1934, C. 426, 48 Stats. 926 (now section 347), providing in substance that any case, civil or criminal, in the Circuit Court of Appeals be competent for the Supreme Court to require by Certiorari, either before or after judgment, that the cause be certified to the Supreme Court.

2. The Circuit Court's decision was rendered November 9, 1943 (R. 134-141).

3. Consent decree was entered July 17, 1941 (R. 13-17). Defendants filed motion to vacate January 14, 1942 R. 18-29), and on November 14, 1942, the District Court vacated the decree in part and sustained it in part (R. 39-54). The Administrator appealed that part of the order vacated to the Circuit Court of Appeals for the Eighth Circuit and on November 9, 1943 that Court held the District Court was in error and reversed that part of the Order appealed from (R. 134-141).

4. The cases sustaining jurisdiction are as follows: *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489; *Anniston Mfg. Co.* v. *Davis, Collector of Internal Revenue*, 301 U. S. 337.

III.

Statement of the Case.

The summary of the matter involved in the petition contains a statement of the case.

IV.

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that the inclusion of the order for restitution in the consent decree

did not go to the jurisdiction or power of the court but to the merits only.

2. The Circuit Court of Appeals erred in holding that any error in the District Court's decree pertained only to the capacity of the plaintiff and to the remedy and not to the power of the Court.

3. The Circuit Court of Appeals erred in holding that the order to pay restitution was of the class of suits which the District Court had power to adjudicate under Section 17 of the Fair Labor Standards Act.

4. The Circuit Court of Appeals erred in reversing the District Court, and in holding the District Court was in error in sustaining petitioners' motion.

Argument.

Point A.

The complaint contains no allegation showing jurisdiction of the Court to order payment of restitution, nor can such jurisdiction be inferred from the incidental powers of a Court of Equity.

The only allegation of jurisdiction set forth in the complaint is that conferred upon the Court by Section 217 of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, C. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.), which is to restrain violations of Section 215 of said Act and in the prayer for relief no demand was made by plaintiff for restitution. The order of the Court contained no consent on the part of the defendants to be enjoined against continuing to withhold wages, nor did the Court's decree contain such restraining language.

In the modified order entered by Justice Joyce he was not only correct in holding that his court lacked statutory

jurisdiction but that the implied powers of an Equity Court could not be invoked. *Mach* v. *Abbott Co.*, 136 Fed. (2d) 7, 10; *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 138, 24 L. ed., 1000; *Decorative Stone Co.* v. *Building Trade Council*, 23 Fed. (2d) 426, Cert. denied 277 U. S. 594, 74 L. ed. 1005.

POINT B.

The Court upon motion of defendants had power to vacate its decree rendered without jurisdiction.

The competency of the court to assume jurisdiction to order payment of restitution in this case was raised on defendants' motion to vacate filed during the same term of court and it was within the power of that court to vacate that decree.

The ruling of the Circuit Court that because the decree was entered by consent and the court had jurisdiction both of the general subject matter and of the parties it was error going to the merits and remedial on appeal and is not open on a motion to vacate is a doctrine subject to many qualifications. This Court stated in *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 23 L. ed. 914:

> "The doctrine invoked by counsel that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition but like all general propositions, is subject to many qualifications in its application. All courts, even the wisest, are more or less limited in their jurisdiction; * * *"

This case was cited with favor in *United States* v. *Turner*, 47 Fed. (2d) 86, 88, where the court stated that:

> "* * * a judgment may be entirely void, even though the court might have jurisdiction of the parties and of the subject matter."

The principle of law herein involved is adequately stated as follows:

> "The court must stay within the limits of its jurisdiction and power. The correction of wrong decisions when made within the scope of the court's authority is on appeal or other form of direct review, but a wrong or even a correct decision where the court has exceeded its jurisdiction and power is void and may be set aside either directly or collaterally.
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> "Hence though the court may have acquired the right to act in the cause and been put in possession of full jurisdiction to go ahead and dispose of the issues involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which it may rightfully exercise under the law of its organization is subject to collateral attack for want or excess of jurisdiction even though the parties may have asquiesced or consented to the exercise of the jurisdiction which the court assumed to exercise, for no act or volition of the litigants can confer a power upon the court which the law does not authorize it to exercise."
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> *Freeman on judgments* (5th Ed.), Sec. 354, p. 734-737.

The rights of the parties as between themselves is not here involved—it is the power of the court that is questioned. As was stated in Exparte in the Matter of Lange, Petitioner, 18 Wall. 163, 21 L. ed. 872, 879, ordering the payment of restitution "was error because the power to render any further judgment did not exist". The reason for this rule is sound. Otherwise the well-recognized principle of law that provisions of judgments by consent which are beyond the jurisdiction of the court are not validated by the fact parties consent to the judgment could and would be invalidated. Courts would assume with impunity jurisdiction which is excluded by the laws and statutes.

As in the instant case the District Court's assumption of jurisdiction was in error and could not be cured by con-

sent of the parties. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62, 24 S. Ct. 598, 48 L. ed. 870; *Chicago, Burlington & Quincy R. R. Co.* v. *Willard*, 220 U. S. 413, 420-421, 31 S. Ct. 460, 55 L. ed. 521; *Valley* v. *Northern F&M Ins. Co.*, 254 U. S. 348, 41 S. Ct. 116, 117, 65 L. ed. 297.

The Circuit Court's ruling that the lower court was in error when it ruled that it was not competent under the facts to order the payment of restitution is clearly inconsistent with authorities cited.

POINT C

Proceeding must conform to the provisions of the statute in pursuing a statutory remedy.

In any proceedings brought under the Fair Labor Standards Act three important elements are involved—the capacity of the plaintiff to bring the action, the applicability of the Act to the particular defendants and the competency of the Court to adjudicate the action instituted.

The Act manifests the action of Congress in a new field. It creates causes of action not theretofore existing. It prescribes specific powers and duties of the Administration Officials, establishes a standard for determining applicability of the Act to given types and classes of employment and declares in clear, concise and understandable language the jurisdiction of the various courts to hear and determine controversies arising out of the Act.

The opinion of the Circuit Court, as delivered by Circuit Judge Thomas, that the lower court was in error in ruling it lacked jurisdiction since "the statute having created a right (a liability) and having given a special remedy for its enforcement, that remedy is exclusive" because the error "pertained only to the capacity of the plaintiff and to the remedy, not to the power of the Court", requires clarification.

In this expression it is shown the Circuit Court has neglected to consider one vitally important fact—that Congress not only declared the Administrator was not authorized to bring such action (*A. H. Belo Corp.* v. *Street, Regional Director of Wage and Hour Law, et al.*, 35 Fed Supp. 430, 432), but coupled such incapacity with a limitation of the jurisdiction of Courts by creating the right and prescribing the remedy. This Court, in *Globe Newspaper Company* v. *Walker*, 210 U. S. 356, 20 S. Ct. 726, stated:

> "It thus appears that Congress has prescribed the remedies it intends to give, this being true 'however inadequate'; as Lord Kenyon said in *Beckford* v. *Hood*, no others can be resorted to. The judgment of the Circuit Court is reversed and the cause remanded to that Court with directions to dismiss the action for want of jurisdiction."

This principle of law is supported by a number of cases including *Pollard* v. *Bailey*, 20 Wall. 520; *Decorative Stone Co.* v. *Building Trade Council*, 23 Fed. (2d) 426, Cert. denied 277 U. S. 594, 74 L. Ed. 1005. The Court here stated on page 427:

> "Courts of equity do not award as incidental relief damages penal in character without statutory authority, as has been frequently held in copyright and patent cases." (Cases cited.)

To disregard the statutory procedure declared by Congress would create discord and disorder in the administration and enforcement of this Act. Courts would be empowered to enter the field of legislation by judicial approval of the consent of parties. As here, defendants are allegedly subject to the provisions of the Fair Labor Standards Act even though several other Governmental Agencies claim jurisdiction of their employees because of the nature of the work performed and are soliciting taxes in addition to those

being paid. By a disregard of statutory procedure and through the instrumentality of consent decrees, the Administrator is determining the rights of persons not parties to the suit nor bound by the court's decision. *Strand* v. *Garden Valley Telephone Co.*, 51 Fed. Supp. 898.

When Congress provided for different types of enforcement in the same Act and established the jurisdiction of the courts as to each type, it drew a plain line of distinction between each and the inference is strong from the history of the Act that the distinction was not inadvertent.

Moreover, the legislative history of the Fair Labor Standards Act is persuasive of the fact that it was the intent of Congress to draw a plain line of demarcation between each type of enforcement under the Act. The Congress considered and refused to combine the two types of enforcement under one procedure.[1]

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[1] The original Wage and Hour Act was introduced in the Senate by Mr. Black on May 24, 1937 as S. 2475, 75th Congress, First Session, and in the House on the same date by Mr. Connery as H. R. 7200, 75th Congress, First Session.

The original Act provided for a "Board" to administer its provisions but by amendment to the proposed bill on December 17, 1937 the "Board" was abolished and an "Administrator" substituted in lieu thereof.

S. 2475 by Section 21 (a) and (b) provided for "Reparations" to employees if they were underpaid by their employer and under Section 21 (c) the procedure for recovery was established. Section 21 (c) reads

> "Any employee entitled to reparation under this section may recover such reparation in a civil action together with costs and such reasonable attorney's fees as may be allowed by the court. *Any such claim for reparation shall not be the subject of any voluntary assignment, except to the Board as herein provided. At the request or with the consent of any employee entitled to such reparation, the Board or an authorized regional representative of the Board, may take an assignment of any claim of such employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay costs and such reasonable attorney's fees as may be allowed by the Court.*" (Emphasis supplied.)

S. 2475 as reported by Senator Black on July 8, 1937, showed that Section 21 (c) had been renumbered Section 18 (b) and the wording had been changed to authorize the Board or a regional representative to *"take an assignment of any claim of such employee under this section in trust for*

Unless it is plain that Congress intended to afford a judicial remedy it must be assumed that the remedy created by Congress is the only one available.

In Circuit Judge Woodrough's concurring opinion he can "see no good reason why the courts should not award him (the Administrator) their mandatory injunctional order on proof of present unlawful withholding of minimum wages from those to whom the law says they must be paid, as well as injunction against violations threatened to be committed in the future."

This would clearly be the assumption of jurisdiction by the court. The court here did not enjoin defendants from continuance to withhold wages and yet ordered payment of restitution and it is that order of payment which should decide the court did not have jurisdiction, on defendants' motion to vacate a decree which named no persons as parties beneficiary nor set forth stated amounts owing to such parties, nor contained an order of the court "enjoining a continuance to withhold."

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the assigning employee * * *". This is the first draft that provided for "joint actions" by employees entitled to reparations.

Section 13 of this draft authorized the Board (later the Administrator) to bring injunction action to restrain violations.

S. 2475 as passed by the Senate July 31, 1937 had the same wording as reported.

S. 2475 as reported to the House on August 6, 1937 had the same wording as reported.

December 17, 1937 (2d Session) the proposed bill was ordered to be printed showing amendments agreed to in the Committee of the Whole House on the State of the Union and recommitted to the Committee on Labor. Section 18 (b) was changed to 17 (b) and provided for an "Administrator" in lieu of a "Board".

April 21, 1938 reported by Committee on Labor of the House and completely rewritten. Civil and criminal action provided for but action by employees for reparation was stricken from the bill. Nor does the Committee report (H. Rep. 2182) mention reparations or civil action by employees.

May 24, 1938, the bill passed the House without mention of reparations or civil action by employees.

The conference report (H. Rept. 2738) dated June 11, 1938 contains the same wording as enacted into law.

The Circuit Court's decision apparently is based on the erroneous assumption that the Fair Labor Standards Act in creating a private right of action presupposes a continuing right (obligation) in the Administrator.

Section 16 (b) of the Act creates a right and establishes a remedy. It provides for recovery by common law action before a jury at the suit of the offended parties. *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, 29. *The right of action continues not the violation.*

Under the doctrine of *Pollard* v. *Bailey, supra*, the right of action having ripened the only remedy the court could give was in accordance with the statute. Remedies under Section 17 of the Act are not a substitute for it.

To support any other theory would be to violate the rule expressed by this Court in *United States* v. *Temple*, 105 U. S. 97, 99 (1881) that it is the duty of the Court "to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operations". See also *Moore* v. *United States*, 249 U. S. 487, 489 (1919).

Point D.

The Court lacked jurisdiction of the parties in interest and therefore could not render a binding judgment for restitution which would be a bar to future employee suits. *Brooks et al.* v. *Southern Dairies, Inc.*, 38 Fed. Supp. 588; *Valley* v. *Northern F. & M. Ins. Co.*, 254 U. S. 348, 41 S. Ct. 116, 117; *Swift & Co.* v. *Hocking Valley R. R. Co.*, 243 U. S. 283, 289, 61 L. ed. 723.

In *Rigopoulas et al.* v. *Kervan*, 47 Fed. Supp. 576, 577, the court stated:

> "The fact that an action was commenced against defendant by the Administrator of the Wage and Hour Division and that the action was compromised has no

> bearing on this controversy. That action was for an injunction. The present plaintiffs were not parties to it. Any settlement thereof did not bind these plaintiffs who by the settlement received the difference between the amount of wages actually paid and the amount each would have been entitled to had the employer paid compensation for overtime pursuant to 7(a) of the Act."

In the case of *Strand* v. *The Garden Valley Telephone Company*, 51 Fed. Supp. 898, 905 (September, 1943), the court stated:

> "With reference to the stipulation and judgment entered into in the case between the Administrator and this defendant, the plaintiffs in the instant action were not parties to that suit and are not bound thereby. The schedule of payments approved by the Administrator, and upon which the defendant attempted to make payments or effect settlements with the plaintiffs, is not binding upon the plaintiffs. *The Administrator has no authority, under the Act or otherwise, to compromise the rights or benefits given to employees by the Act itself.*
> "I, accordingly, hold that the plaintiffs have not released the defendant, and that the plaintiffs all come within the meaning of the Fair Labor Standards Act of 1938, and as such are entitled to recover wages and an equal amount of liquidated damages." (Emphasis supplied.)

Ordering the payment of restitution to unknown, unclassified employees in unknown amounts will be "begetting business for another court". The door is left wide open for further litigation. The payment of restitution under a consent decree does not settle the issue raised by the Government and put in controversy by the Bill of Complaint, although it does invite suits from every employee. In such suits, the decree of the court cannot be pleaded as *res adjudicata*.

In *Bowen* v. *Baker et al.*, 35 Fed. Supp. 852, 855, the court held that no one is required to litigate questions which primarily and directly involve issues with third parties not before the court. The court cited the case of *Minnesota* v. *Northern Security Company*, 184 U. S. 199, 235:

> "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl. § 72."

Money paid in restitution is the money of persons not before the court and their right to receive it is not in controversy in this case.

In the case of *The People of the State of California* v. *San Pablo and Tulare Railroad Company*, 149 U. S. 308, the court stated:

> "The duty of this court, as of every jurisdictional tribunal, is limited to the determining rights of persons or of property which are actually controverted in the particular case before it * * * but the court is not empowered to decide moot questions or abstract propositions or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge

the power or affect the duty of the court in this regard."

If the court enforced a mandatory injunction requiring the payment of restitution, it would be based upon a question not presented by the complainant and in so doing, the court would of necessity be required to read into Section 17 equitable rights not there stated and, thus, the question passed upon by the court would be moot.

We respectfully submit, for the reason heretofore assigned, that writ of certiorari should be granted by this Honorable Court, so that it may review the decision of the Circuit Court of Appeals and finally reverse it.

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